CCA v. City & DOC, 51 OCB 28 (BCB 1993) [Decision No. B-28-93 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the
Improper Practice Proceeding

--between --

DECISION NO. B-28-93

CORRECTION CAPTAINS ASSOCIATION, Inc.,

Petitioner,

--and--- DOCKET NO. BCB-1469-92

CITY OF NEW YORK and NEW YORK CITY
DEPARTMENT OF CORRECTION,

Respondents.
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DECISION AND ORDER

On March 2, 1992, the Correction Captains Association, Inc., ("the Union" and "Petitioner") filed a verified improper practice petition against the City of New York ("the City" and "Respondent") and the New York City Department of Correction ("the Department" and "Respondent"). The petition alleges that the City and the Department violated Subsections (1) and (4) of Section 12-306a of the New York City Collective Bargaining Law ("the NYCCBL").[1] The petition cites violation of Subsection (4)

[1]Section 12-306a of the NYCCBL provides, in pertinent part, as follows:

> **Improper practices; good faith bargaining.** Improper public employer practices. It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees. (continued...)

by the respondents' alleged refusal to bargain in good faith over the impact of civilianization of the duties of Captains assigned to the in-house titles of Administrative Captain and Personnel Captain as well as over the productivity and gain-sharing that such civilianization would produce. The petition alleges violation of Subsection (1), charging that the Union has been undermined as the bargaining representative of captains whose assignments are affected as a result of the civilianization process.

On April 13, 1992, the City and the Department, appearing by the Office of Labor Relations ("OLR"), filed a verified answer to the petition. The Petitioner did not file a reply.

BACKGROUND

In 1979, pursuant to a consent decree in favor of a plaintiff-class of inmates within the custody of the New York

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(... continued)

Section 12-305 of the NYCCBL provides, in relevant part, as follows:

> **Rights of public employees and certified employee organizations.**
> Public employees shall have the right to self - organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities . . . .

City Department of Correction and against the then-Commissioner of Correction Benjamin J. Malcolm, et al., the United States District Court for the Southern District of New York ordered, inter alia, that the Department implement a system to assure that property and money belonging to the Department's incarcerated inmates be properly receipted, safely stored and returned to them upon their transfer or release. In 1984 and 1989, the Office of Compliance consultants (“OCC”), a neutral body established by agreement of the parties to monitor compliance with the decree, issued two reports documenting significant non-compliance. At the request of the Court and working with the parties, the OCC submitted to the Court an "Inmate Property Work Plan" ("the Work Plan" and "the Plan") dated March 6, 1991, which set forth a schedule for implementing measures to encourage compliance with the property provisions of the consent decree. The Court reviewed the Work Plan, heard from the OCC and the parties regarding its provisions, and determined that the measures and schedule set forth in it were reasonable and necessary in order to bring about compliance. On March 11, 1991, the Court directed that the Work Plan be entered as an Order of the Court.

The authors of the Plan state, "The Plan attempts to balance the need for resources that we believe critical to achieve compliance with the City's fiscal constraints." In part, the Plan provides for replacing captains with civilians to handle

business management functions, with purportedly resulting net financial savings to the City. It is the Department's actions in replacing these captains with civilians, allegedly in compliance with the Plan, which gives rise to the Union's charges herein.

POSITIONS OF THE PARTIES

Petitioner's Position

The petition alleges a violation of Subsection (4) of Section 12-306a of the NYCCBL as a result of the refusal of the City and the Department to bargain in good faith over the practical impact which civilianization of the titles of Administrative Captain and Personnel Captain may have on the safety of employees assigned to adjoining posts "who," the petition states, "are now more vulnerable in emergency situations as a result of the civilianization process." The petition also alleges violation of the same subsection of the NYCCBL as a result of the employer's refusal to bargain in good faith over the sharing of any productivity gains resulting from the civilianization of the above titles. Furthermore, the petition contends that the City and the Department have undermined the Union's position as the bargaining representative of the captains whose assignments are affected by the civilianization component of the Work Plan.

As relief, the petition asks us to order the City and the Department to bargain in good faith over any safety impact and over gain-sharing in relation to productivity which results from the captains civilianization program. The petition asks for a cease-and-desist order against the City and the Department from the further implementation of the program until good faith bargaining results in an agreement or in an impasse panel's final and binding award addressing both the safety implications and productivity gain-sharing issues. The petition also seeks a cease-and-desist order insofar as the civilianization program undermines the Union as the bargaining representative of Correction Captains.

Respondents' Position

The Respondents reply that the Department's decision to civilianiz certain positions subsequent to a court order is within management's prerogative pursuant to section 12-307b of the NYCCBL.[2] In addition, the Respondents argue that the

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[2] Section 12-307b of the NYCCBL provides, in pertinent part, as follows:

> **Scope of collective bargaining; management rights.**
>
> It is the right of the city . . . acting through its agencies, to . . . determine the methods, means and personnel by which government operations are to be conducted . . . and exercise complete control and discretion over its organization. . .
>
> (continued...)

petition fails to allege facts which would raise a colorable claim under the NYCCBL. Absent our finding that the civilianization program at issue has a practical impact on the Union's members, the Respondents maintain that the City is under no duty to bargain with the Union; therefore, they reason, the circumstances alleged by the Union in support of its claim fail to state a violation of Subsection (4) of Section 12-306a of the NYCCBL.

In the answer, the Respondents also argue that the Union has failed to allege facts sufficient to support its claim that the Union's status as bargaining representative of the Captains in the civilianized titles has been undermined and that Subsection (1) of Section 12-306a of the NYCCBL has been violated by the City and the Department in that regard. The answer states that the employer has taken no action which would interfere with, restrain or coerce Union members in the exercise of their rights under Section 12-305 of the NYCCBL. The Respondents ask us to dismiss the petition.

2(... continued)
Decisions of the city ... are not within the scope of collective bargaining, but questions concerning the practice impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

DISCUSSION

As a preliminary matter, we must determine two scope of bargaining issues presented by the petition. One concerns whether the civilianization at issue constitutes a practical impact on safety requiring alleviation and creation of a potential duty to bargain over such alleviation. The other concerns whether the gain resulting from civilianization of certain departmental functions is mandatorily bargainable.

We have repeatedly construed Section 12-307b to guarantee the City's the unilateral right to assign and direct its employees, to determine what duties employees will perform during working hours, and to allocate duties among its employees, unless that right is limited by the parties themselves in their collective bargaining agreement[3] or by the constraints that the alleviation of any resultant practical impact might impose.[4] It is well settled that civilianization programs are a proper exercise of the management rights grounded in Section 12-307b. Implementation of such programs will not give rise to a duty to bargain under Section 12-307a unless we find that the employer's exercise of these rights results in a practical impact.[5] The determination of the existence of a practical impact is a

[3] Decisions No. B-6-91, B-37-87 and B-23-87.

[4] Decision No. B-66-88.

[5] Decision No. B-18-93.

condition precedent to the determination of whether there are any bargainable issues arising from the impact.[6] As we have long held, practical impact is a factual question, and the existence of such impact cannot be determined when insufficient facts are provided by the union.[7] A petitioner must present more than conclusory statements of a practical impact in order to require the employer to bargain[8] or, indeed, in order to warrant a hearing to present further evidence.[9]

With regard to the issue of whether the civilianization program herein poses a practical impact on safety, the Union's allegation consists of two statements in the petition. In its statement of the nature of the controversy, the Union alleges:

> Respondents took the above actions [i.e., advised the petitioner that the City would continue court-ordered civilianization of the Administrative Captain and Personnel Captain titles] without bargaining with Petitioner on the safety impact on employees assigned to adjoining posts who are now more vulnerable in emergency situations as a result of the civilianization process.

In its statement of the relief requested, the Union asks us to order the respondents to cease and desist from continuing to implement the civilianization program until bargaining results in

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[6] Decision No. B-6-91.

[7] Decision Nos. B-6-91 and B-66-88.

[8] Decision No. B-6-91.

[9] Decision No. B-66-88.

an agreement or until an impasse panel issues a final and binding award:

> which addresses the safety implications of Respondents' actions. This request is predicated on the fact that there will be irrevocable harm to Petitioner if Respondents are permitted to continue the unilateral implementation of the civilianization of the administrative and personnel Captains positions . . . .

The Union offers no factual allegations in support of its conclusory statements that "adjoining posts are now more vulnerable in emergency situations as a result of the civilianization process" and that "there will be irrevocable harm to Petitioner if Respondents are permitted to continue . . . civilianization of the administrative and personnel Captains positions . . . ." The record is devoid of any probative evidence which would support the Union's claim of a practical impact of a safety nature.

Because the Union has not alleged any facts sufficient to warrant a hearing on this issue, we conclude that there is no basis for a finding that a practical impact on safety attaches to the management action in question.

Having determined that the Union has provided insufficient facts on which we could find that the civilianization program has created a practical impact on safety, we turn to the question concerning the bargainability of productivity savings realized from the program.

The Union would have us declare as a mandatory subject

of bargaining the disposition of productivity gains which may be realized by the hiring of civilians and the subsequent redeployment of unit members to traditional duties of correction captains. As we have noted, the management rights under Section 12-307b of the NYCCBL may be curtailed upon our finding that a practical impact on a regular condition of employment has resulted from an unreasonably excessive or unduly burdensome workload.[10] Here, it is unclear whether the Union is seeking a productivity share by way of practical impact bargaining or simply as one economic component of a more general wage proposal in on-going negotiations for a collective bargaining agreement. We note that the parties' current collective bargaining agreement has expired and that they currently are engaged in a new round of bargaining for a successor agreement.

If the Union is seeking a productivity share by way of practical impact bargaining, we find that it has failed to state what the practical impact is which allegedly results from the civilianization program herein. To the extent that the Union may be seeking to include projected productivity gains realized by the civilianization program herein within a more general negotiation of wages, the subject of gain-sharing would be

[10] Decision Nos. B-9-91, B-66-88, B-37-82, B-27-80 and B-16-74.

mandatorily bargainable.[11]

Finally, we find no merit in the Union's contention that civilianization of the in-house titles of Administrative Captain and Personnel Captain has undermined the Union as bargaining representative of captains whose assignments are affected by the civilianization program at issue. The petition states no facts which constitute interference with or restraint or coercion of members of the bargaining unit in the exercise of their rights granted in Section 12-305 of the NYCCBL. Therefore, we cannot find that the employer's action violates Section 12-306a.

We have determined that the Union's assertion that the City has improperly refused to bargain over demands for alleviation of the perceived impact is at best premature and cannot sustain an improper practice claim. We have found no merit in the Union's contention that the City and the Department have interfered with the rights of public employees granted under the NYCCBL as a result of the actions which are the subject of the instant petition. To the extent that the Union seeks productivity gain-sharing by way of practical impact bargaining as a result of the civilianization of the in-house titles of Administrative Captain and Personnel Captain, we hold that the Union has failed to state a claim of practical impact which would

[11] Decision No. B-9-91.

permit such bargaining. As such, we dismiss the instant improper practice petition in its entirety. However, to the extent that the Union seeks to include productivity gains realized by implementation of the civilianization program within a more general negotiation of wages in an agreement succeeding the contract signed January 14, 1993, we hold the subject of gain-sharing to be mandatorily bargainable.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that, insofar as it alleges a practical impact on safety and on work conditions, the improper practice petition filed by the Correction Captains Association, Inc., docketed as BCB-1469-92, be, and the same hereby is, dismissed;

ORDERED, that, insofar as it seeks to include productivity gains realized by implementation of the civilianization program herein within a more general negotiation of wages in an agreement succeeding the contract signed January

14, 1993, the subject of productivity gain-sharing in this context is mandatorily bargainable.

Dated: New York, New York
July 29, 1993

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